No. 717

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

Several days after filing the petition in this case, the Interior Department received an indenture, dated January 23, 1941, whereby the respondent quitclaimed to the United States all the lands to which the first cause of action relates. These are lands within the Walapai Reservation, in contrast to those outside the reservation which are covered by the second cause of action. Respondent executed this quitclaim in order to obtain certain benefits under the Transportation Act of Septem-

ber 18, 1940 (Public, No. 785, 76th Cong.), which were conditional upon the release of its claims to unpatented lands (Respondent's Brief, Appendix, pp. 15–16). It happens that the lands claimed by the railroad within the reservation were never patented while those outside the reservation were patented. Hence, the quitclaim, being limited to unpatented lands, covered only lands within the reservation. The quitclaim thus has no relevance to the merits of the pending action and does not represent a concession by either party with respect to the merits of the pending suit.

Respondent's brief, however, appears to rely on this quitclaim inferentially as the mainstay of its opposition to the petition for certiorari. Respondent apparently assumes, in the first place, that the quitclaim eliminates the first cause of action from the case. Upon this assumption, respondent presents arguments against the granting of certiorari which are directed solely to the second cause of action, and which, therefore, even if true, would not support the conclusion they are designed to bear. Finally, respondent ignores the principal arguments presented by the petition in support of the grant of certiorari, apparently assuming that these arguments relate only to a cause of action that has been eliminated by the quitclaim. This is a double error, for (a) the arguments of the petition apply to *both* causes of action, and (b) neither one has been eliminated by the quitclaim.

I

THE QUITCLAIM DOES NOT ELIMINATE THE FIRST CAUSE OF ACTION OR DETRACT FROM ITS IMPORTANCE

The respondent's assumption that the quitclaim eliminates the first cause of action or renders it unimportant is palpably erroneous.

In the first place, the first cause of action specifically alleges various trespasses by the respondent involving the use or leasing of the lands covered therein (R. 8); and the general prayer for relief, applicable to both causes of action, demands an accounting "for all rents, issues and profits derived from the leasing, renting, or use of lands subject to said right of occupancy by said Hualapai tribe" (R. 20). If the respondent was a trespasser prior to January 23, 1941, it cannot render a suit for accounting moot by executing a quitclaim deed to the property from which rents, issues and profits have been unlawfully derived.

In the second place, the quitclaim of reservation lands does not in any way reduce the importance of a favorable or unfavorable decision on the present petition or on the merits of the case so far as the *Indians* are concerned. Notwithstanding that the railway company may have no further interest in these lands, the fact remains that the United States in its capacity as guardian of the Walapai Tribe is seeking in this action to secure an adjudication of the "right of occupancy and use" of the tribe (R. 19-20), and the execution of a quitclaim deed to the United States does not give the Walapai Tribe the relief which it seeks. In fact, if the deci-

sion of the court below that the Walapai Indians have no rights of occupancy and use in the lands within the reservation so quitclaimed is to be made final by the denial of this petition for certiorari, it may be doubted whether, under existing law,[1] the United States can continue to treat the quitclaimed areas as part of the Walapai Reservation. Thus, the quitclaim of January 23 does not detract in any way from the practical need, or from the legal justification, of a determination that the lands within the reservation are subject to rights of Indian occupancy, as alleged in the complaint.

II

THE QUITCLAIM DOES NOT FILL THE GAP IN RESPONDENT'S ARGUMENT

The entire argument of the respondent's brief is directed to establishing that the decision of the courts below was correct *in so far as it relates to the second cause of action.* Respondent apparently relies upon the quitclaim to buttress the conclusion that even though the decision below may have been erroneous as to the first cause of action any such error has been rendered harmless by the quitclaim. In this vein respondent takes the liberty of reformulating the issue presented by the petition as an issue involving only "lands, not within a reservation" (Respondent's Brief, p. 5). In this vein respondent argues that precedent and policy justify limiting Indian possessory rights to Indian

[1] Act of May 25, 1918, 40 Stat. 561, 570, 25 U. S. C. 211.

reservations (Respondent's Brief, p. 6), cites authorities pertinent only to nonreservation claims (p. 7), distinguished as irrelevant petitioner's authorities dealing with reservation rights (pp. 8-9), and argues that failure to limit Indian rights to reservation lands would undermine the policy of opening Mexican cession lands to settlement, would detract from railroad grants given in good faith, and would destroy the tax structure and the security of titles in the Southwest (pp. 10–13). These arguments are refuted by authorities cited in the petition, and petitioner hopes to have an opportunity to deal with them in detail, on the merits, at some future time. For the present, it is sufficient to point out that even if these arguments were all valid, they would fail to demonstrate the propriety of the decision below on the first cause of action. On the contrary, the very limitations recognized in the authorities that respondent cites (Brief, pp. 8, 11, 12, 13) indicate that the courts below were wrong in denying the possibility of Indian possessory rights in the reservation area covered by the first cause of action. Since that cause of action is, as has been shown, not moot, the respondent's quitclaim cannot properly be used to fill the gap in its argument against the granting of the writ here sought.

III

THE QUITCLAIM DOES NOT ANSWER THE ARGUMENTS OF THE PETITION

Respondent not only couches its argument as if the first cause of action had been eliminated from

the case, but appears to assume further that the principal reasons advanced in the petition in support of the granting of certiorari apply *only* to this supposedly eliminated cause of action. If these assumptions were true, respondent would perhaps be justified in dismissing without argument, or ignoring, the principal arguments presented in the petition in his answering brief. A brief reference, however, to the arguments presented in the petition which are thus passed over will demonstrate (a) that these arguments apply to *both* causes of action, and (b) that the quitclaim does not answer any of these arguments.

(1) The petition presents the issue whether lands within the Mexican cession are subject to the rule established by this Court, without geographical qualification, under which aboriginal occupancy creates rights against all but the United States, until extinguished by the United States (Petition, pp. 10–11; R. 206). Without arguing this issue at this time, it is proper to note that it is an issue upon which the decision of the courts below would establish a special area in which general rules laid down by this Court for the protection of Indians would be disregarded. The issue is therefore one upon which this Court should pass. The failure of respondent's brief to deal with this issue would, of course, be justified if it related to a question disposed of by the quitclaim. But the issue of possessory rights in Mexican cession lands is inherent in *both* causes of action, because it is relevant to

nonreservation lands as well as to reservation lands. To the resolution of this issue, therefore, the respondent's quitclaim, covering only reservation lands, is immaterial.

(2) Related to the foregoing issue, and equally unrelated to the quitclaim, is the question of whether Congress must act affirmatively and specifically to create Indian rights, or whether such rights may flow from such a general policy as was upheld by this Court in *Cramer* v. *United States*, 261 U. S. 219.

(3) In maintaining that any Indian rights that existed were terminated by various acts of Congress or actions of administrative officials, the courts below, and the respondent's brief, either cite as precedents radically different situations, where the permanent, continuous, exclusive possession alleged in this case was not found (Respondent's Brief, pp. 6–7), or give to railroad grant acts, State enabling acts, and military expeditions a force which this Court has denied in cases arising outside of the Mexican cession area (Respondent's Brief, pp. 11–13; R. 207–212). No reason has been advanced why any such statute or action should terminate Indian possessory rights within the Mexican cession area when similar laws and actions do not have this effect outside of this area (Petition, pp. 13–15). Again, the decision of the courts below and argument of the respondent would establish a special area in which rules laid down by this

Court for the protection of Indians would be disregarded. This issue is therefore one upon which this Court should render a decision. It is, finally, an issue inherent in both causes of action. To the resolution of this issue, therefore, the respondent's quitclaim is immaterial.

(4) The issue of whether the Indian Tribes of the Mexican cession area had acquired possessory rights under Spanish or Mexican sovereignty is an issue which has been before this Court only in cases in which such rights have been upheld (Petition, pp. 16–17). The court below (R. 206–207) and the respondent (Brief, pp. 9–10) pass over these cases or refer vaguely to them as "exceptional," although they nowhere meet the issue by pointing to any general rule, approved by this Court, to which this affirmative recognition of rights would be an exception. Failure to meet this issue cannot be justified on the theory that the issue has become moot in the case at bar. The issue is equally pertinent to both causes of action. To the resolution of this issue, therefore, the respondent's quitclaim is immaterial.

(5) Finally, this case presents the basic issue of whether the petitioner has been deprived of a fair trial by an improper extension of the doctrine of judicial notice (Petition, pp. 16–19). Petitioner does not question the right of the courts below to notice the various reports of officials and travelers which they have noticed, or even the propriety of

respondent's now asking this Court (Respondent's Brief, p. 2, fn. 1) to take judicial notice of the fact that in 1928 the Board of Indian Commissioners said that the neighbors of the Walapai Indians thought they were "squatters" in the nonreservation land they claim, together with other items of greater or less evidentiary weight. Petitioner does, however, protest that the proper scope of judicial notice is exceeded *if assertions in documents judicially noticed are taken to be proved, beyond all possibility of contradiction by countervailing evidence, merely because these assertions are contained in documents attached to a motion to dismiss a complaint instead of being offered in evidence during a trial, after issue joined.*

There are some questions as to which the fact that responsible Government officials make certain reports is relevant, as for instance in the constitutional question of whether the legislature may have had a reasonable basis for supposing that certain social conditions existed when it passed a given law. So it may be with other exceptional questions affecting constitutionality or jurisdiction, as in the two cases cited by the respondent upholding judicial notice addressed to pleadings (Respondent's Brief, p. 2). But the question of possession in this case is not of that character. Here the complaint alleges that the Walapai Tribe has at all material times held continuous and "exclusive" possession (Complaint, R. 4, 8, 9, 16) of

the lands described, and the courts below have reversed the normal rule that allegations of fact in a complaint are deemed true on demurrer and have concluded that contrary statements about the habits of these Indians made by various officials in documents attached to a motion to dismiss are to be deemed true and made the basis for adjudicating the issue against the Indians finally, and absolutely, and without a trial. Petitioner insists that all of the Government officials whose views are noticed by respondent and by the courts below are fallible human beings, that their respective views on Walapai possession are not entirely consistent, that the truth of any report or opinion on this subject is properly subject to proof, and that petitioner is entitled to a day in court on these issues.[2] As this Court said, *per* Cardozo, *J.*, in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292,

> * * * notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore,

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[2] These issues are themselves of such importance that an erroneous determination of them, even upon a full and fair such review needed when the determination of these issues trial, would call for review by certiorari. All the more is has been reached without any trial.

> Evidence, sec. 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ibid.* Cf. *Shapleigh* v. *Mier*, 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. * * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial [pp. 301–302].

What Mr. Justice Cardozo pointed to as the vice of the lower court decision in the *Ohio Bell Telephone* case was—

> that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out [p. 302].

That, indeed, is the situation in the case at bar. Petitioner does not know to this day what facts the courts below took notice of when they concluded (R. 195–196, 212) that no possible evidence that petitioner might produce would show the kind of possession that would give rise to any possessory rights whatever within the area designated in the

complaint.* There must be some situations i which long-continued, exclusive, continuous posses sion (as alleged in Complaint, R. 4, 8, 9, 16) doe create possessory rights, because the courts belo (R. 206–207) and the respondent (Brief, pp. 9–10 refer to "exceptional" cases where, even in forme Mexican territory, such rights have been so create and recognized. But what kind of possession th petitioner would have to show—whether it woul be necessary to show the existence of farms, vi lages, or irrigation ditches, how continuous an how long such possession would have to be—a these matters are left in the realm of mystery by th use of "judicial notice" to cover a mixture of law fact, and hearsay evidence. Certainly, if the cri terion of aboriginal possession laid down by thi Court in other cases (R. 206) is rejected for th area of the Mexican cession, some equally definit

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* Repeatedly the respondent's brief (pp. 2, 11–14) and t opinion of the court below (R. 208–209) confuse the iss presented by the pleadings by arguing that Congress cou not have intended to withhold from disposition the whole the extensive area designated in the second cause of actio of the complaint, and inferring that therefore there are Indian rights in any part of the area. This argument is *non sequitur*. Petitioner seeks an opportunity to establis some possessory rights in this area. Even if the petitione on the trial, should succeed in proving permanent posse sion and possessory rights only in those villages or settl ments, outside the reservation, which the Walapai ha occupied from time immemorial and still occupy, the pet tioner would be entitled to a substantial judgment in i favor. Dismissal of the complaint precludes any suc proof.

criterion should be offered in its place. At least this is an issue upon which this Court should hear further argument. It is, like all the other issues presented by the petition, an issue inherent in *both* causes of action. To the resolution of this issue, therefore, the respondent's quitclaim is immaterial.

Other points raised by the petition (pp. 7–10) involve generalizations from the foregoing five specific points and are, therefore, equally unaffected by respondent's brief or by its quitclaim.

Finally, it should be said that neither the respondent's brief nor its quitclaim casts doubt upon the importance of the issues which this petition raises, issues which, as respondent concedes (Brief, pp. 13–14), will affect Indian possessory claims over a large area not directly at issue in this case.

Respectfully submitted,

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The Solicitor General authorizes the filing of this reply brief.

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